

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

September 18, 2007 Session

DOUGLAS MARSHALL MATHIS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Houston County

No. 4352 Robert E. Burch, Judge

No. M2006-02525-CCA-R3-PC - Filed April 25, 2008

Petitioner, Douglas Marshall Mathis, was indicted by the Houston County Grand Jury for first degree murder and second degree murder. In May of 2001, Petitioner entered a guilty plea to second degree murder, which he subsequently withdrew. At the conclusion of a jury trial, he was convicted of first degree murder. Petitioner was sentenced to life in prison. Petitioner unsuccessfully appealed his conviction to this Court. *State v. Douglas Marshall Mathis*, No. M2002-02291-CCA-R3-CD, 2004 WL 392710 (Tenn. Crim. App., at Nashville, Mar. 3, 2004). On June 16, 2005, Petitioner filed a petition for post-conviction relief. The post-conviction court denied the petition by order filed November 14, 2006. Petitioner now appeals the denial of his petition. On appeal he argues that: (1) he was denied a fair and impartial jury; (2) he was denied the right to confront two witnesses at trial; (3) he was prosecuted for first degree murder without a valid first degree indictment; and (4) his trial counsel rendered ineffective assistance of counsel. We have reviewed the record and conclude that Petitioner has waived his issues with respect to the denial of a fair and impartial jury and right to confront witnesses, Petitioner's indictment was valid, and he was afforded effective assistance of counsel. Therefore, we affirm the decision of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES, and THOMAS T. WOODALL, JJ., joined.

Drew W. Taylor, Erin, Tennessee, for the Appellant, Douglas Marshall Mathis.

Robert E. Cooper, Jr., Attorney General & Reporter; Benjamin A. Ball, Assistant Attorney General; Dan Alsobrooks, District Attorney General; and Carey Thompson, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

Factual Background

On May 11, 1999, the victim, Selwyn Ward, and his family were camping at a campsite near the Magnolia Bridge in Houston County. *Douglas Marshall Mathis*, 2004 WL 392710, at *1. Petitioner and his brother, Jeffrey Mathis, approached the Wards' camping site by truck, and an altercation occurred between Petitioner and the victim. *Id.* at *3. Before they drove away, Petitioner pointed his gun out of the window and pulled the trigger. *Id.* Mrs. Ward heard a "loud boom" and her husband rolled off of his chair. *Id.* at *2. Sheriff Kenneth Barnes reported to the crime scene and found the victim with a gunshot wound to the face. *Id.* at *1. While at the crime scene, Sheriff Barnes was informed that Petitioner was at the sheriff's department and wanted to make a statement. *Id.* During the interview, Petitioner admitted that he had shot the victim and had thrown the shotgun into the river. *Id.* at *3.

On November 15, 1999, Petitioner was indicted by the Houston County Grand Jury for first degree murder in Count 1 and second degree murder in Count 2. On May 18, 2000, Petitioner entered a plea agreement to Count 2 and received a fifteen-year sentence to be served at 100% as a violent offender. The State entered a nolle prosequi to Count 1, first degree murder, pursuant to the plea agreement. In May of 2001, Petitioner filed a petition for post-conviction relief to set aside his guilty plea. The trial court held a hearing on the matter, during which the State agreed that Petitioner was entitled to relief. The trial court vacated the second degree murder conviction and set the case for trial.

On March 12-15, 2002, the trial court held a trial. At the conclusion of the trial, the jury convicted Petitioner of first degree murder. Petitioner was sentenced to an automatic life sentence. Petitioner appealed his conviction to this Court. On appeal, Petitioner argued that the evidence was insufficient, the trial court erred in giving an irrelevant definition of "knowing" in the jury instructions, the prosecutor made improper comments during closing argument, he was denied the right to a fair and impartial jury, and the trial court erred in admitting certain evidence. *Id.* at *1. We affirmed the judgment of the trial court. *Id.* at *10.

Post-conviction Hearing

On June 16, 2005, Petitioner filed a pro se petition for post-conviction relief. The post-conviction court appointed counsel and ordered the filing of an amended petition. On August 29, 2005, Petitioner's appointed counsel filed an amended petition for post-conviction relief. The post-conviction court held a hearing on July 14, 2006.

The first witness at the post-conviction hearing was Agent Joe Craig who interviewed Petitioner's brother, Jeffrey Mathis, in connection with the crime. Between Petitioner's initial

indictment for second degree murder and a superseding presentment to the grand jury to include first degree murder, Agent Craig obtained additional information from Mr. Mathis. This information was presented to the district attorney. There was no discussion of seeking a superseding indictment until this information was discovered. Agent Craig testified that he was neither directed by the district attorney to seek out evidence to support a first degree murder charge, nor was he present when such a request was made of others. During the interview between the two indictments, Mr. Mathis told Agent Craig that based upon Petitioner's behavior on the bridge overlooking the victim's campsite, Mr. Mathis believed that Petitioner went to the campsite with the intention of killing someone. While on the bridge, Petitioner told Mr. Mathis "to keep his mouth shut." Petitioner also tried to reload the gun after shooting the victim and told Mr. Mathis that "you're lucky I can't get another shell in here." Mr. Mathis believed this was a threat upon his life. This was the new evidence presented to the grand jury.

Agent Craig also prepared a weapon that was used as demonstrative evidence at Petitioner's trial. The actual murder weapon was never recovered, so a similar weapon was prepared to present at trial. The weapon used was based upon descriptions from Petitioner, Mr. Mathis and the victim's wife. Agent Craig contacted the crime lab and, based upon a diagram of the crime scene, tried to recreate the crime with the exact distance and exact type of weapon. Agent Craig did not know if a document containing this information was provided to the defense. Agent Craig stated that he saw the victim's children in the hallway of the courthouse. He also saw the district attorney speak to the victim's wife and children during the trial. Agent Craig also stated that he knew Mr. Mathis had an issue with stress leading up to the trial because Mr. Mathis did not want to testify at the trial, but Agent Craig did not remember whether or not Mr. Mathis attempted suicide.

Dr. Charles Harlan was the next witness at the hearing. At the time of the trial, Dr. Harlan was the consulting forensic pathologist for the area including Houston County, and he testified at Petitioner's trial. At the time of the trial, Dr. Harlan had pending charges for ethical violations with the state agency governing physicians. Dr. Harlan did not specifically inform the State of these charges, because they were generally known. Dr. Harlan did recall speaking with Petitioner's trial counsel prior to trial.

Joseph Estis was a prisoner in the Houston County jail the night Petitioner was brought to the jail. Mr. Estis testified that when Petitioner was brought into the jail, he was not in good condition. Mr. Estis could not tell whether Petitioner was intoxicated or not. When the officers asked Mr. Estis to move his belongings off of the bottom bunk, the officers took Petitioner to another cell. They said that it was impossible for Petitioner to get on the top bunk.

Ray Puckett was also a prisoner at the Houston County jail after the incident. He came into contact with Mr. Jeffrey Mathis while at the jail. While the two men were moving a filing cabinet, Mr. David Hicks, an investigator with the district attorney's office, came into the room. According to Mr. Puckett, Mr. Hicks told Mr. Mathis he wanted Mr. Mathis to testify at the trial. When Mr. Mathis said he did not want to testify, Mr. Hicks told Mr. Mathis he was going to get a bunch of time if he did not testify.

Greg Deplanche had been at Magnolia Bridge, overlooking the victim's campsite, early on the day of the shooting. He had been fishing and left when it got dark. Mr. Deplanche saw the victim while he was fishing. Mr. Deplanche did not see any firearms at the scene. He specifically stated that the victim did not have a firearm. He said that the victim and his family were camping. The victim did not mention any problems with Petitioner or his brother. Mr. Deplanche also stated that the victim was not intoxicated when he saw him.

Michael D. Lowery was at Magnolia Bridge with Mr. Deplanche early on the day of the shooting. Mr. Lowery did not see any firearms and did not remember the victim drinking. There were no arguments or altercations while he was there. The victim did not mention any problems with Petitioner or his brother.

Danny Hicks attended Petitioner's trial. He stated that he saw the victim's children in the courthouse during the trial. Mr. Hicks saw the district attorney speak with the victim's family. Mr. Hicks could not remember whether the children were in the courthouse at the time the jury was brought in to the courtroom.

Donna Hicks also attended Petitioner's trial. She saw the victim's children outside the courtroom. At the trial, the district attorney asked if the children could come in, but the trial court stated that a mistrial would be declared if the children came into the courtroom in front of the jury. Ms. Hicks testified that the children were out in the hall when the jury came in. She also stated that the jury spoke with the children and "hit at the hands" of the children. Ms. Hicks stated that this occurred during the trial.

Donna Ray was a juror at Petitioner's trial. She stated that Mr. Jeffrey Mathis had pulled a gun on her, her husband and her son around Thanksgiving of 1990. At the time of voir dire, Ms. Ray did not mention the incident because Mr. Mathis was not on trial. She did not realize that Mr. Mathis was involved in the crime. Ms. Ray stated that her judgment was not affected by the incident with Mr. Mathis.

Kimberley Ward, the victim's wife, was a witness at Petitioner's trial. At the post-conviction hearing, she testified that she did not discuss her testimony with any other witnesses during the trial. Her two younger children were in the courthouse during the trial. Shortly before the trial, she asked the district attorney if the children could come into the courtroom during the trial. She was told they could not come into the courtroom. She could not remember whether the children were in the courthouse when the impaneled jury was brought into the courtroom. Mrs. Ward did not see one of her children "high-five" a juror. The children were in the courthouse until the trial started, then one of Mrs. Ward's friends took the children outside to play.

Gray Jackson was also a witness at Petitioner's trial. He stated at the hearing that he did not speak with any other witness during the trial about testimony or the proceedings.

Mr. Jeffrey Mathis testified at the post-conviction hearing. He denied attempting to commit suicide before Petitioner's trial. He stated that because of his medication he does not remember his entire testimony at the trial. He also stated that he was unable to testify truthfully because he was sick the night before and had taken some medication. Mr. Mathis did not remember having a telephone conversation with his brother in which he said he had tried to commit suicide. He was never threatened to testify, but he was told he could leave that day if he promised to testify. He served four years in connection with Mr. Ward's death. Mr. Mathis denied being with Mr. Puckett and Mr. David Hicks at the jail at the same time. Mr. Mathis also did not recall his interviews with Agent Craig and Mr. David Hicks.

Malinda Lafferty is a licensed psychologist who completed an evaluation of Petitioner. There is no indication in her records from Petitioner's evaluation to show that she spoke with Petitioner's trial counsel. She did not testify at Petitioner's trial. She did submit a letter regarding her evaluation of Petitioner. As a result of her evaluation, she concluded that Petitioner was capable of standing trial. She also discovered that he had a history of depression and substance abuse. Ms. Lafferty was asked by the trial court to determine whether Petitioner was competent to stand trial and what his mental condition was at the time of the crime. She did not evaluate Petitioner for diminished mental capacity. In her report she concluded that Petitioner's behavior the night of the murder was related to alcohol abuse, not mental illness.

Petitioner's trial counsel was also a witness at the post-conviction hearing. Trial counsel represented Petitioner at his first post-conviction hearing stemming from his guilty plea to second degree murder. Trial counsel did not see anything in the nolle order that indicated that the entry of the guilty plea was conditioned on anything. Trial counsel did not represent Petitioner at the entry of the guilty plea to second degree murder. Trial counsel met with Petitioner after the recall of the guilty plea in order to prepare for Petitioner's trial on first degree murder. He went to see Petitioner several times, as well as corresponding by letter. Trial counsel also spoke with Petitioner's brother, Joe Mathis, and Petitioner's mother. Trial counsel spoke with Petitioner regarding his rights and the indictment. He also discussed strategy and the theory of the case. Trial counsel and Petitioner discussed the strategy as being twofold, first that there was no premeditation and second that it was self-defense and/or a reckless or negligent type homicide. Trial counsel investigated this theory primarily by speaking with Petitioner's initial trial counsel. Petitioner's previous trial counsel had hired a private investigator to look into Petitioner's case. Trial counsel also spoke with Petitioner's family members. Trial counsel interviewed highway department workers who had seen the victim and his family at the campground on various occasions to establish that the victim usually carried a gun. Trial counsel did not interview Jeffrey Mathis or Mrs. Ward. Trial counsel spoke with everyone who gave a statement and to all the law enforcement personnel involved with the case.

Trial counsel also recalled seeing the victim's children in the courthouse. He brought it up to the trial court, but he informed the trial court that he was not asking for a mistrial. Trial counsel stated he did not request a mistrial because the jury had just been seated. However, trial counsel did not recall any specific instances where the jury and the children came into contact with each other. Trial counsel also spoke with the person who completed Petitioner's mental evaluation. He could

not remember the name, but he said if the name of the person who completed Petitioner's mental evaluation was Malinda Lafferty, he did speak with her. Trial counsel stated that he did not pursue the diminished capacity evaluation or intoxication at the time of the offense because there was other unfavorable evidence about Petitioner that would have been admitted in connection with those issues.

Trial counsel also researched legal issues involved in Petitioner's case, in particular, several issues with the indictment. However, this research did not result in trial counsel filing any motions concerning the indictment. Trial counsel admitted that he did not object to several allegedly inappropriate statements made by the district attorney at trial. Trial counsel stated that there was no tactical reason for failing to object. He stated that he just did not object.

Trial counsel also stated that he did not see the weapon the State presented for demonstrative purposes until the beginning of the trial. He argued to the trial court that the weapon should not be presented. The State informed trial counsel that tests were conducted on the demonstration weapon. Because trial counsel did not see the weapon until the beginning of the trial, he never conducted tests with the demonstration weapon. The weapon used was important because part of Petitioner's theory was the spread pattern of the shot from the sawed-off shotgun and whether there was premeditation based upon the distance of the spread. Trial counsel did not object to the State failing to present the weapon sooner. The State was just informing trial counsel about the demonstration weapon at that point. At one point during the trial, the trial court referred to the weapon presented by the State as the "murder weapon." Trial counsel objected and he and the assistant district attorney approached the bench. The trial court subsequently gave a curative instruction to the jury.

Trial counsel also stated that the trial court did not give a curative instruction regarding the victim's children. Trial counsel recalled when he first spoke with Petitioner he was in shackles. Trial counsel could not remember whether that was in the courtroom or outside the courtroom. Trial counsel did not discuss this with the trial court. Trial counsel also testified that he found out Petitioner's brother had taken some prescription drugs on the date he was to testify. Trial counsel did not believe that this medication had any affect on Mr. Mathis's testimony. Trial counsel testified that he was not made aware by the State of ethical complaints made against Dr. Harlan, but he was aware of them from the news. However, trial counsel could not remember if the information from the news was from before the trial or after. Trial counsel did not use the information to attack Dr. Harlan's credibility because trial counsel did not feel that Dr. Harlan's testimony was detrimental to Petitioner. Dr. Harlan testified regarding the shot pattern that went along with Petitioner's theory in the case.

Petitioner also testified at the post-conviction hearing. He stated that he was brought into the courtroom in shackles the day of his trial, and the jury saw him. According to Petitioner, he met with trial counsel three or four times and each meeting lasted fewer than thirty minutes.

On November 14, 2006, the post-conviction court filed an order denying Petitioner's petition for post-conviction relief. An accompanying memorandum opinion had been filed on November 6, 2006. Petitioner now appeals from the post-conviction court's denial of his petition.

ANALYSIS

Petitioner argues that the post-conviction court erred in denying his petition because he was not prosecuted on a valid first degree murder indictment, his trial counsel was ineffective, he was denied a fair and impartial jury, he was denied the right to confront Dr. Harlan as a witness, and he was denied the right to confront his brother, Jeffrey M. Mathis, as a witness.

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Impartial Jury and Confrontation of Witnesses

We initially address Petitioner's arguments that he was denied a fair and impartial jury, he was denied the right to confront Dr. Harlan as a witness, and he was denied the right to confront his brother, Jeffrey Mathis, as a witness. Petitioner argues that an incident during which Jeffrey Mathis pointed a gun at one of Petitioner's jury members, her husband and her son, tainted the jury. Petitioner argues that Dr. Harlan neglected to inform the State regarding his pending ethical charges and this denied Petitioner his right to properly confront Dr. Harlan. Petitioner also argues that Jeffrey Mathis was not competent to testify at the trial because he was taking medication at the time and attempted to commit suicide either the night before or morning of trial. The State argues that Petitioner has waived all three of these issues because he failed to raise these issues before his post-conviction petition.

We agree with the State. Petitioner was convicted by a jury of first degree murder. He subsequently filed a notice of appeal and appealed to this Court. Petitioner did not include these issues in his direct appeal. A ground for post-conviction relief is waived "if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." T.C.A. § 40-30-106(g). The claim for relief is not waived if it is (1) "based upon a constitutional right not recognized as existing at the time of trial," and (2) "either the federal or state constitution requires retroactive

application of that right.” T.C.A. § 40-30-106(g)(1). Petitioner herein did not raise these issues on direct appeal and has failed to show that the claim for relief is not waived.

Therefore, these issues are waived.

Indictment

Petitioner argues that the first degree murder indictment used for his trial was not valid. Petitioner argues that the trial court discharged him with regard to the first degree murder indictment in a nolle prosequi order entered pursuant to his prior guilty plea to second degree murder. Petitioner argues that for this reason he was prosecuted without an indictment. The State argues alternatively, that Petitioner has waived this issue for failing to raise it previously and that the indictment was valid because he sought the withdrawal of his guilty plea.

As stated previously, an issue in a post-conviction petition “is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented . . .” T.C. A. § 40-30-106(g). There are two exceptions to this rule, “(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.” *Id.* Petitioner did not present this issue in his motion for new trial or in his direct appeal and has failed to show that one of the two exceptions applies.

In addition, a defendant must raise issues with regard to defects in an indictment that are matters of form before trial, or they are waived. *State v. Nixon*, 977 S.W.2d 199, 121 (Tenn. Crim. App. 1997); *see also* Tenn. R. Crim. P. 12(f); *State v. Kennedy*, 649 S.W.2d 275, 279 (Tenn. Crim. App. 1982). Petitioner does not contend that the charge included in the indictment is in error, but rather that the State should have completed a formal proceeding to reinstate his indictment. Therefore, this is an issue of form, rather than substance, and Petitioner has waived the issue failing to present it prior to trial or on direct appeal.

Even if the issue was not waived, Petitioner would not be successful on this issue. “[A] nolle may be entered on a legal condition precedent, and, in such case, it is not final or effective until the condition is performed.” *State ex rel. Hobbs v. Murrell*, 93 S.W.2d 628, 630 (Tenn. 1936). In *State v. Neely*, 1 S.W.3d 679 (Tenn. Crim. App. 1999), the defendant was indicted for a worthless check charge. 1 S.W.3d at 682. This charge was dismissed as part of a plea agreement. *Id.* The defendant subsequently withdrew his guilty plea, and the trial court reinstated the charge. *Id.* On appeal, the defendant argued that he could not be properly tried for the charge and that the trial court should have issued a new indictment. *Id.* This Court held that the dismissal of the charge “was implicitly conditioned upon the defendant honoring his plea agreement and was not effective or final until this condition was performed.” *Id.* The Court then stated that the plea agreement was not binding

because the defendant withdrew his guilty plea, and the trial court acted appropriately in reinstating the worthless check charge. *Id.*

The procedural posture of the case at hand was identical to that in *Neely*. As stated above, Petitioner pled guilty to second degree murder on May 18, 2000. On the same date, pursuant to the plea agreement, the trial court entered a nolle prosequi order dismissing his indictment. On May 9, 2001, Petitioner filed a petition for post-conviction relief from his guilty plea. On September 4, 2001, the trial court entered an order vacating Petitioner's prior conviction for second degree murder and stating, "The Petitioner shall go to trial on the charge of first degree murder." As in *Neely*, the trial court acted properly in reinstating the indictment for first degree murder.

Therefore, this issue is without merit.

Ineffective Assistance of Counsel

Petitioner argues that his trial counsel was ineffective because: (1) he did not move for a mistrial after the jury had contact with the victim's children; (2) he did not pursue a diminished capacity evaluation by Malinda Lafferty; (3) he did not object to the State's introduction of the demonstration weapon; (4) he did not object to improper argument by the State; and (5) he did not object to Petitioner being brought before the jury in shackles.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for trial counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins*, 911 S.W.2d at 347. This Court may not second-guess a

reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Victim's Children Interacting with Jury

At the post-conviction hearing, Petitioner and Ms. Hicks testified that they observed the jury “high-fiving” the victim’s children outside of the courtroom and interacting. Trial counsel, Danny Hicks, and Mrs. Ward all stated that they did not recall the members of the jury and the children “high-fiving” or having any interaction. In its order, the post-conviction court found that Petitioner failed to prove that he was prejudiced by trial counsel’s failure to move for a mistrial. We agree with the post-conviction court.¹ One juror actually testified at the hearing regarding a previous interaction with Jeffrey Mathis. She was not questioned regarding possible interactions with the victim’s children. The post-conviction court also pointed out in its order that several other members of the jury had been subpoenaed and were in the courtroom to testify at the post-conviction hearing. Nonetheless, there was no proof entered that the jury knew that the children were the children of the victim. There was also no proof entered that members of the jury and the children spoke with each other. Petitioner has not shown by clear and convincing evidence that had trial counsel moved for a mistrial it would have been successful. Petitioner has failed to prove that the outcome of the trial would have been any different had trial counsel moved for a mistrial. Therefore, he has not met the second prong, prejudice.

Diminished Capacity Defense

At the post-conviction hearing, trial counsel testified that he did not pursue a diminished capacity evaluation because additional damaging evidence would have been admitted at trial. Clearly, this was a tactical decision on the part of trial counsel. In addition, Ms. Lafferty testified that in her evaluation of Petitioner’s competency to stand trial she did not see any issues with diminished capacity, but rather substance abuse was his problem. Petitioner did not submit evidence of an additional mental evaluation to show that he could have used diminished capacity as a defense. Again, Petitioner has not proven by clear and convincing evidence that trial counsel was deficient, or if trial counsel was deficient that he was prejudiced by such deficiency. As stated above, it is not this Court’s prerogative to second guess a reasonably-based trial strategy. Trial counsel made it clear at the hearing that his decision not to pursue a diminished capacity defense was a matter of strategy.

Admission of Demonstration Weapon

At trial, the State attempted to admit a weapon similar to the murder weapon. *Douglas Marshall Mathis*, 2004 WL 392710, at *10. According to our opinion on direct appeal, trial counsel objected to the introduction of the weapon. *Id.* The trial court admitted the weapon for

¹We do not mean to insinuate that counsel’s performance in not moving for a mistrial was deficient.

demonstration purposes only. *Id.* Clearly, trial counsel objected to the introduction of the weapon, and the trial court admitted the weapon over trial counsel's objection. On appeal, this Court found that the trial court did not err in admitting the weapon. *Id.* Petitioner has shown neither deficiency on the part of trial counsel nor actual prejudice.

Improper Argument

At the post-conviction hearing, trial counsel admitted that the district attorney made several inappropriate comments at trial. Trial counsel testified that he did not object to the statements, and there was not a tactical reason for his failure to object. On direct appeal, Petitioner argued that the district attorney's improper statements amounted to prosecutorial misconduct. *Id.* at *7. We noted that Petitioner failed to make a contemporaneous objection and analyzed the issue pursuant to the plain error doctrine. *Id.* at *7-8. We determined that Petitioner was unable to prove that "the jury was unduly swayed from its duties as explained in the jury instructions." *Id.* at *8.

The same can be said of his post-conviction hearing. Petitioner has not proven that he was prejudiced by trial counsel's failure to object. We have held in a previous proceeding that Petitioner was unable to prove plain error as a result of the district attorney's inappropriate comments. To be successful on a post-conviction petition, Petitioner must prove both deficient performance by counsel and that the deficient performance was prejudicial. *See Powers*, 942 S.W.2d at 558. As stated above, to show prejudice Petitioner must show that but for the deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. As we stated in the direct appeal, to prove plain error occurred a defendant must prove that the alleged error, "more probably than not affected the judgment or would result in prejudice to the judicial process." *Marshall Mathis*, 2004 WL 392710 at *9. This is essentially the same standard. Therefore, this Court has previously determined that the inappropriate comments did not affect the judgment so that the result of the proceedings would have been different.

For this reason, Petitioner is unable to prove that he was prejudiced by trial counsel's failure to object.

Petitioner in Shackles in Front of Jury

At the post-conviction hearing, Petitioner stated that the jurors saw him once in the courtroom in shackles and once outside the courthouse while they were getting into the van to go to their hotel. Trial counsel testified that he remembered Petitioner complaining about the jurors seeing him in shackles. However, trial counsel did not have an independent recollection of the jury seeing Petitioner in shackles.

On appeal, Petitioner argues that trial counsel was ineffective in failing to object to Petitioner's appearance in shackles. However, we cannot find an argument in Petitioner's petition or amended petitions for post-conviction relief arguing ineffective assistance of counsel on this basis. It is also clear to us from the post-conviction court's memorandum opinion that the post-conviction

court did not consider this issue as one of Petitioner's bases for ineffective assistance of counsel. The memorandum opinion has a separate section addressing each argument regarding ineffective assistance of counsel. The issue regarding the shackles is addressed as a separate due process issue.

A party may not take one position regarding a ground in the trial court and change its strategy or theory midstream and advocate a different ground or reason in this Court. *See State v. Aucoin*, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988); *State v. Dobbins*, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988). It is clear that the post-conviction court addressed the issue as whether Petitioner's alleged presence in shackles in front of the jury violated his due process rights. The trial court found that Petitioner had not proven that he was seen by the impaneled jury deciding his case, as opposed to the voir dire panel or alternate jurors.

In addition, we point out that even though a juror was called to testify at the post-conviction hearing, she was not asked whether she saw Petitioner in shackles. The post-conviction court also points out in its memorandum opinion that other jurors were present at the hearing and could have testified regarding this allegation. However, they were not called. Therefore, even if Petitioner had properly argued in the post-conviction court that his trial counsel was ineffective for failing to alert the trial court, he could not prove prejudice because he proved neither when the jury saw him in shackles, nor whether it was the actual jury that decided his case.

As stated above, none of Petitioner's allegations with regard to ineffective assistance of counsel have merit.

CONCLUSION

For the reasons stated above, we affirm the decision of the post-conviction court.

JERRY L. SMITH, JUDGE